

H.R. 4167 FACTS

H.R. 4167'S IMPACT ON STATE MILK SAFETY LAWS

ISSUE 3

MARCH 7, 2006

In the early 20th century, adulterated and spoiled milk was one of the biggest public health threats in the United States. Unsanitary collection and storage of milk was responsible for causing a host of milkborne diseases, including tuberculosis and diphtheria. The states and municipalities were responsible for passing critical legislation which mandated how the dairy industry gathered, processed, shipped, and sold milk. To this day, the states have maintained their historical role of ensuring the safety of our nation's milk supply.

You may have been told by the International Dairy Foods Association (IDFA) that: "H.R. 4167 would not preempt state laws on food sanitation, including state milk sanitation statutes."¹ The IDFA argues that because there are no conflicting federal requirements and ostensibly state inspection authorities persist, state milk statutes are not preempted.

According to the Association of Food and Drug Officials, "nothing could be further from the truth."² State food safety officials, including the National Association of State Departments of Agriculture, and the Florida, New York, and Wisconsin Departments of Agriculture, have concluded that H.R. 4167 threatens to preempt their state milk safety programs.³

As discussed below, H.R. 4167 threatens to overturn the nation's long-standing system for ensuring the safety of the milk supply—and this sweeping change could occur without a single congressional hearing.

H.R. 4167 Preempts State Milk "Contamination" and "Adulteration" Laws

For the last 50 years, the states have held the primary responsibility for milk safety. The FDA participates in this food safety system by providing guidance to the states in the form of model codes providing for joint federal-state cooperative programs. The states may voluntarily adopt

¹ Letter from International Dairy Foods Association, *A Gallon of Truth About National Uniformity For Food Labeling* (March 3, 2006).

² Letter from Marion Aller, President, Association of Food and Drug Officials, to Rep. Henry A. Waxman (January 16, 2006).

³ Letter from J. Carlton Courter III, President, National Association of State Departments of Agriculture, to Members of the House Energy and Commerce Committee (December 8, 2005); letter from Charles H. Bronson, Commissioner of Agriculture, Florida Department of Agriculture and Consumer Services, to Rep. Tom Feeney (February 14, 2006); letter from Patrick H. Brennan, Commissioner, State of New York Department of Agriculture and Markets, to Members of the New York Delegation (March 1, 2006); letter from Rodney Nilsestuen, Secretary, Wisconsin Department of Agriculture, Trade and Consumer Protection to Members of the Wisconsin Delegation (December 12, 2005).

the standards and laws recommended by FDA. However, there are no overarching federal laws or requirements for grade A milk.

A key component of the state laws regulating milk are provisions that prevent the sale of milk that has become contaminated or adulterated. These provisions, however, would be preempted by H.R. 4167.

Section 2 of H.R. 4167 would amend section 403A of the Federal Food Drug and Cosmetic Act (FFDCA), which specifies areas of the law in which the state and local governments cannot act because they are preempted by the federal government.⁴ H.R. 4167 would add several new substantive food safety laws to the list of preempted laws, preventing state and local governments from acting in these areas, unless their laws and regulations are identical to the equivalent federal laws and regulations. Of particular importance for milk safety, H.R. 4167 would prevent state and local governments from taking action against food that is “adulterated” because it contains “any poisonous or deleterious substance” unless the state definition of what makes a food adulterated is the same as the federal definition.⁵

State food safety officials have explained that the effect of these provisions is to preempt state laws preventing the sale of contaminated or adulterated milk. According to the Florida Commissioner of Agriculture:

*H.R. 4167 would preempt a state from enforcing any law relating to food safety that is not identical to the Federal Food, Drug and Cosmetic Act. It would place at risk our cooperative programs from milk.... Those programs are based on model codes, ordinances and standards which are developed by a conference body and recommended by but not adopted as rule by FDA. Under this bill, states without laws identical to the FFDCA law defining adulterated food would lose their legal foundation for adopting these model ordinance and conducting these cooperative programs.*⁶

The state food and drug officials further explain:

Whether food becomes contaminated by accident, intent, or act of nature, it is critical that states retain their authorities to contain and remove food from the marketplace. Because we believe that H.R. 4167 compromises these authorities, it is our belief that the impact of this legislation is huge. If enacted, H.R. 4167 would significantly impede resolution of the unsafe

⁴ Federal Food, Drug, and Cosmetic Act (hereinafter “FFDCA”) (online at <http://www.fda.gov/opacom/laws/fdcact/fdcact4.htm>).

⁵ Sec. 402(a)(1),(2),(6), and (7), and 402(c), FFDCA.

⁶ Letter from Charles H. Bronson, Commissioner of Agriculture, Florida Department of Agriculture and Consumer Services, to Rep. Tom Feeney (February 14, 2006).

*conditions and removal of contaminated foods from the human food supply.*⁷

H.R. 4167's Effect on State Milk Sanitation Laws

H.R. 4167 does not explicitly include a “sanitation” provision in the list of state laws that are preempted. Proponents of the bill have used this fact to argue that state milk laws would not be affected because state milk sanitation laws would be preserved.

This argument is erroneous. According to the state food and drug officials:

*States perform sanitation inspections in an effort to assist food businesses in preventing contamination or adulteration of products, but one of the states' critical complementary functions is to take action when these preventive measures fail. ... Sanitation and adulteration are not identical, but rather complementary, and if public health is to be protected, states must retain their authority to respond to contaminated (adulterated) products – without seeking federal permission.*⁸

Under H.R. 4167, it is possible that states may be able to continue their inspections of milk processing facilities. But if these sanitary inspections find evidence of contamination or adulteration of milk, the state officials would be powerless to act. That makes no sense from a regulatory perspective, and it would undermine public confidence in the milk supply.

⁷ Letter from Marion Aller, President, Association of Food and Drug Officials, to Rep. Henry A. Waxman (January 16, 2006).

⁸ *Id.*